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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 731

WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

Petitioners,

v.

PRESTON G. PREVATT, as Ancillary administrator, of the Estate of EDITH L. TREES, Deceased; GILDA DAHLBERG, a widow; POLLY LUX, a freedealer; TEDLAND REALTY CORPORATION, a Florida corporation,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEF

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ARGUMENT

RESPONDENTS' POINT 1

Respondents urge that the time for filing a petition

for certiorari in this court had already expired prior to December 5, 1957, when petitioners filed their application for extension of time in this court.

The original judgment and opinion in the Supreme Court of Florida was entered on July 24, 1957. The petition for rehearing was denied by the court on September 18, 1957. The extension of time within which the petition for certiorari was granted by Justice Hugo L. Black on December 5, 1957, 78 days after the denial of the petition for rehearing and the issuance of the mandate.

It is well established that where the rules of the lower court allow petition for rehearing or new trial to be filed within a prescribed number of days and the petition is filed within that period, the ninety days begin to run from the date of the lower court's order denying the petition for rehearing. (Dept. of Banking v. Pink, 317 U.S. 264, 266; Pfister v. Northern Ill. Financial Corp., 317 U.S. 144.)

Even the case cited by the respondents in support of their erroneous contention is contra to their position. (Gypsy Oil Co. v. Escoe, 48 S. Ct. 112, 257 U.S. 498, 72 L. Ed. 393.) There, the court, determined that the mere application for leave to file a second petition for rehearing did not toll the time within which to petition for certiorari, but further stated:

> "If, however, a timely motion to file a second petition is granted and the petition is actually entertained by the court, then the time within which application may be made here for certiorari **begins to run from the day when the**

court denies such second petition." (Emphasis supplied)

The time within which the petition may be filed runs from the day the judgment becomes final. The date of the finality of the judgment of an appellate court is determined by state rules. In Florida, such a judgment does not become final until the mandate is issued to the trial court. (State v. City of Clearwater 108 Fla 635, 146 So 836) In the case at bar, the mandate was issued to the trial court on September 18, 1957. (Pet. App-E, p. 62)

For these reasons, it must be concluded that the contention of the respondents that the petition for writ of certiorari was not within the time allowed by the rules of this court is wholly without merit.

RESPONDENTS' POINT 2

Respondents urge that the federal question was never properly raised in the Florida court since such a question was first raised in the petition for recall of mandate, which was submitted contrary to the rules of the Florida court.

The petitioners brough to the attention of the Florida Supreme Court the fact that they had been deprived of rights in violation of the due process clause and equal protection clause of the Fourteenth Amendment of the U. S. Constitution. It is the respondents' contention that because the petition to recall mandate was not enterained by the court and because the federal question so raised was never determined the petitioners have failed to meet the condition subsequent to review on certiorari.

Though it is the Petitioners' position that the Florida Supreme Court was in error in construing the petition to recall mandate as a second petition for rehearing, under the doctrine of Saunders v. Shaw 244 U.S. 317, 37 Sup Ct Rep 312, a ruling on that point is not necessary to determine whether or not the Federal Question was properly raised in these proceedings.

In that case Justice Holmes speaking for the court said:

> "The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily, that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of Constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence is heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation (citations omitted). It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of Constitutional right to the attention of the Chief Justice of the State by his

assignment of errors. We do not see what more he could have done."

The principles above set forth are clearly applicable to the case at bar.

RESPONDENTS' POINT 3

Respondents urge that all decisions by the Florida courts in the case at bar--including the trial court's decree, the Supreme Court's judgment and opinion, the Supreme Court's ruling on the petition for rehearing, and the Supreme Court's ruling on the petition to recall mandate—were decided solely on the basis of local law and local rules.

It is stated by the respondents, in their argument under this Point, that:

> "Nothing in the petition for certiorari discloses any error by the Florida courts in judging the evidence or in applying the substantive law. All questions raised by the petitioners are procedural matters in no way affecting the fundamental decision."

The Supreme Court of Florida, in entertaining a matter outside the record and further, in basing its decision upon such a matter, acted in derogation of its own Rule 31, which provides:

> "Appeals will be heard and determined on assignments of error, appendices and briefs filed in accordance with the rule of this court; but,

> the record on appeal will be referred to when necessary to settle certain conflicts between the parties. **No assignments of error or matter contained in an appendix will be considered unless it is properly based on the record on appeal.**" (Emphasis supplied)

Further, the Supreme Court of Florida found it necessary to amend its opinion of July 24, 1957, to include in that opinion the fact that the record in the lower court sufficiently established a ground for affirmance of the trial court's decree. The necessity of this amendment makes it apparent that the Supreme Court of Florida recognized that the petition for rehearing was well founded and had properly attacked their prior opinion. Then, in an unprecedented action, that court visited this petition for rehearing to the amended opinion, denied it, and cut off any rights of the petitioners to question the amended opinion. There are no rules, local or otherwise, which justify such procedure. Thus, the petitioners were denied the right to be heard in this matter and have been denied substantive due process of law and the equal protection of the law by the Florida Supreme Court's failure to apply its own procedural rules in a uniform and just manner.

RESPONDENTS' POINT 4

Respondents urge that the question presented by the petitioners and their statement of reasons for granting a writ of certiorari reveal that their sole grounds for invoking the Fourteenth Amendment of the Federal Constitution is that the Florida Supreme Court did not grant them a rehearing under Florida law. A rehearing is not

a matter of right but rests in the sound judicial discretion of the court.

Even a cursory reading of the petition reveals that the above is an inaccurate statement of the grounds for invoking the Fourteenth Amendment to the Federal Constitution. An examination of the question presented, appearing on pages 3 and 4 of the petition, clearly sets forth the manner in which the petitioners were deprived of their federal constitutional rights.

It is also the contention of the respondents that the petition for rehearing filed by the petitioners "attacked the judgment of the Florida Supreme Court on a merely collateral issue and completely failed to point out any error in the actual ratio on decidenda of the judgment". The so-called collateral issue referred to by the respondents is the amendatory ordinance improperly considered by the Florida Supreme Court in reaching its decision of July 24, 1957. A brief quotation from the opinion sufficiently establishes that this was the primary and determining factor in that decision:

> "The principal point raised on the appeal and argued by appellant intervenors is **completely undermined** by the enactment of the amendatory ordinance." (Emphasis supplied)

The amendment to the opinion of July 24, 1957, (A-E) mentions, for the first time, that the record in the trial court was in any way an adequate basis for the affirmance of the trial court's injunctive decree. With this amendment, the court denied the petition for rehearing stating:

"The petition for rehearing having been visited to the modified opinion as above set forth is denied."

This order clearly precluded the petition from questioning the efficacy of the amended opinion by petition for rehearing.

RESPONDENTS' POINT 5

Respondents urge that the petition for certiorari reveals, on its face, that there are no special and important reasons for granting it, as required by Rule 19 of this court.

The reasons for granting the writ of certiorari, as contained in the petition, pages 10 to 15, clearly establish the consideration of the questions in the case at bar to be a matter of great importance and far-reaching effect necessary to satisfy the jurisdiction of the Supreme Court of the United States.

Respectfully submitted,

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